

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JOSEPH B. JENSEN, SR,  
individually and on behalf of similarly  
situated individuals, and JBJ, a minor  
child,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR, in his official  
capacity as President of the United  
States; JAY R. INSLEE, in his official  
capacity as Governor of Washington  
State; ANTHONY S. FAUCI, in his  
official capacity as Director for the  
National Institute of Allergy and  
Infectious Diseases; CENTER FOR  
DISEASE CONTROL AND  
PREVENTION; NATIONAL  
INSTITUTE OF HEALTH; and the  
UNITED STATES FOOD AND  
DRUG ADMINISTRATION,  
Defendants.

NO. 4:21-CV-5119-TOR

ORDER DENYING PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION AND TEMPORARY  
RESTRAINING ORDER, AND  
GRANTING FEDERAL  
DEFENDANTS' MOTION TO  
DISMISS

BEFORE THE COURT are Plaintiffs' Motion for Preliminary Injunction  
and Temporary Restraining Order (ECF No. 19) and Federal Defendants' Motion

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY  
INJUNCTION AND TEMPORARY RESTRAINING ORDER, AND  
GRANTING FEDERAL DEFENDANTS' MOTION TO DISMISS ~ 1

1 to Dismiss (ECF No. 36). This matter was submitted for consideration with  
2 telephonic oral argument on November 18, 2021. Plaintiff Joseph B. Jensen, Sr.,  
3 proceeding *pro se*, appeared on behalf of the plaintiffs. Camille M. McDorman  
4 and Jeffrey T. Even appeared on behalf of State Defendants. John T. Drake and  
5 Molly M.S. Smith appeared on behalf of Federal Defendants. The Court has  
6 reviewed the record and files herein, considered the parties' oral arguments, and is  
7 fully informed. For the reasons discussed below, Plaintiffs' Motion for  
8 Preliminary Injunction and Temporary Restraining Order (ECF No. 19) is  
9 DENIED and Federal Defendants' Motion to Dismiss (ECF No. 26) is GRANTED.

#### 10 **BACKGROUND**

11 This case concerns President Biden's Executive Order Nos. 14042 and  
12 14043 (collectively the "Executive Orders") requiring COVID-19 vaccination for  
13 federal employees and federal contractors, and Governor Inslee's Proclamation 21-  
14 14 *et seq.* (the "Proclamation") requiring COVID-19 vaccination for state  
15 employees and contractors. Plaintiff Jensen ("Plaintiff") states he is employed by a  
16 federal government subcontractor and is, thus, subject to the Executive Orders.  
17 ECF Nos. 1 at 3, ¶ 5; 32 at 3, ¶ 6. Plaintiff does not specify in his pleadings who  
18 his employer is; however, Plaintiff affirmed at oral argument that he is subject to  
19 the Executive Orders. Plaintiff states he was informed by his employer on  
20 September 30, 2021 that he would be subject to the Executive Orders. ECF No. 32

1 at 6, ¶ 25. There is a communication from Hanford Mission Integration Solutions  
2 addressed to “All HMIS Employees” dated September 30, 2021. ECF No. 21-1 at  
3 10.

4 Plaintiff also states he is a registered member of the Washington  
5 Interscholastic Athletics Association (“WIAA”) and the Washington Officials  
6 Association (“WOA”) and is certified to coach high school athletics. ECF No. 32  
7 at 3, ¶ 6. At oral argument, Plaintiff indicated he earns a “game fee” for his  
8 services, but stated the fee equates to something less than minimum wage.  
9 Plaintiff claims he was told by WIAA and WOA that “officials would not be  
10 subject to the” Proclamation. *Id.* at 5, ¶ 16. However, Plaintiff indicates he was  
11 later informed that the Office of the Superintendent of Public Instruction for  
12 Washington State determined that high school sports officials are considered to be  
13 “engaged[d] in or in fact engages in work while physically present at a building,  
14 facility, jobsite, project site, unit, or other defined area owned, leased, occupied by,  
15 or controlled by . . . an operator of an Educational Setting.” ECF No. 32 at 6, ¶ 22.  
16 This language is found under the Proclamation’s definition for “on-site volunteer”  
17 and “on-site contractor,” both of which fall under the definition of “worker” for the  
18 purposes of the Proclamation’s applicability. ECF No. 21-1 at 48, at 51–52.

19 On August 23, 2021, Plaintiff, proceeding *pro se*, filed a Complaint on  
20 behalf of himself and others similarly situated, and his minor child, alleging

1 various federal constitutional and statutory violations stemming from the Executive  
2 Orders and the Proclamation. ECF No. 1. Plaintiff filed a First Supplement to  
3 Complaint on October 19, 2021. ECF No. 32. On October 15, 2021, Plaintiff filed  
4 a Motion for Preliminary Injunction and Temporary Restraining Order. ECF No.  
5 19. State and Federal Defendants (collectively “Defendants”) oppose the motion.  
6 ECF Nos. 37, 38. Additionally, Federal Defendants filed a Motion to Dismiss on  
7 October 29, 2021, seeking dismissal of all claims alleged against Federal  
8 Defendants. ECF No. 36. Plaintiff conceded at oral argument that his claims  
9 against Federal Defendants should be dismissed with the option to amend.

10 The Court will first address the Motion to Dismiss and then the Motion for  
11 Preliminary Injunction and Temporary Restraining Order.

## 12 DISCUSSION

### 13 I. Legal Standard—Motion to Dismiss

14 The Federal Rules of Civil Procedure permit a party to seek dismissal  
15 through several avenues, two of which are asserted here. First, motions to dismiss  
16 under Rule 12(b)(1) challenge the subject matter jurisdiction of an action. Fed. R.  
17 Civ. P. 12(b)(1). The challenge to subject matter jurisdiction can be asserted in  
18 one of two ways: through a “facial attack” or a “factual attack.” *Leite v. Crane*  
19 *Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Here, Federal Defendants challenge  
20 purely legal questions and do not challenge Plaintiff’s factual assertions. ECF No.

1 36. A facial attack accepts the truth of the plaintiff's allegations but challenges the  
2 sufficiency of the complaint's allegation to invoke federal jurisdiction. *Leite*, 749  
3 F.3d at 1121. Courts resolve facial challenges as they would a motion to dismiss  
4 under 12(b)(6). *Id.* Accordingly, courts consider the motion by evaluating the  
5 complaint on its face. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039  
6 (9th Cir. 2004).

7 Second, a motion to dismiss for failure to state a claim under Rule 12(b)(6)  
8 "tests the legal sufficiency" of the plaintiff's claims. *Navarro v. Block*, 250 F.3d  
9 729, 732 (9th Cir. 2001); Fed. R. Civ. P. 12(b)(6). To withstand dismissal, a  
10 complaint must contain "enough facts to state a claim to relief that is plausible on  
11 its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has  
12 facial plausibility when the plaintiff pleads factual content that allows the court to  
13 draw the reasonable inference that the defendant is liable for the misconduct  
14 alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). This  
15 requires the plaintiff to provide "more than labels and conclusions, and a formulaic  
16 recitation of the elements." *Twombly*, 550 U.S. at 555. While a plaintiff need not  
17 establish a probability of success on the merits, he or she must demonstrate "more  
18 than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at  
19 678.

1 When analyzing whether a claim has been stated, the Court may consider the  
2 “complaint, materials incorporated into the complaint by reference, and matters of  
3 which the court may take judicial notice.” *Metzler Inv. GMBH v. Corinthian*  
4 *Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008) (citing *Tellabs, Inc. v. Makor*  
5 *Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). A complaint must contain “a  
6 short and plain statement of the claim showing that the pleader is entitled to relief.”  
7 Fed. R. Civ. P. 8(a)(2). A plaintiff’s “allegations of material fact are taken as true  
8 and construed in the light most favorable to the plaintiff[,]” however “conclusory  
9 allegations of law and unwarranted inferences are insufficient to defeat a motion to  
10 dismiss for failure to state a claim.” *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399,  
11 1403 (9th Cir. 1996) (citation and brackets omitted).

12 In assessing whether Rule 8(a)(2) has been satisfied, a court must first  
13 identify the elements of the plaintiff’s claim(s) and then determine whether those  
14 elements could be proven on the facts pled. The court may disregard allegations  
15 that are contradicted by matters properly subject to judicial notice or by exhibit.  
16 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). The court  
17 may also disregard conclusory allegations and arguments which are not supported  
18 by reasonable deductions and inferences. *Id.*

19 The Court “does not require detailed factual allegations, but it demands  
20 more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*,

1 556 U.S. at 662. “To survive a motion to dismiss, a complaint must contain  
2 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible  
3 on its face.’” *Id.* at 678 (citation omitted). A claim may be dismissed only if “it  
4 appears beyond doubt that the plaintiff can prove no set of facts in support of his  
5 claim which would entitle him to relief.” *Navarro*, 250 F.3d at 732.

#### 6 **A. Plaintiff’s Claims on Behalf of Others**

7 Federal Defendants first challenge *pro se* Plaintiff’s ability to assert claims  
8 on behalf of Plaintiff’s minor child and “others similarly situated.” ECF No. 36 at  
9 4. “It is well established that the privilege to represent oneself *pro se* . . . is  
10 personal to the litigant and does not extend to other parties or entities.” *Simon v.*  
11 *Hartford Life, Inc.*, 546 F.3d 661, 664 (9th Cir. 2008). Courts routinely reject *pro*  
12 *se* plaintiffs’ attempts to bring claims on behalf of others in a representative  
13 capacity. *Id.* (collecting cases). Plaintiff conceded at oral argument that he may  
14 not represent anyone other than himself. Accordingly, any claims brought on  
15 behalf of Plaintiff’s minor child or “others similarly situated” are dismissed.

16 Federal Defendants also seek dismissal of any claims asserted against  
17 President Biden’s Executive Order No. 14043 because Plaintiff lacks standing.  
18 ECF No. 36 at 5. On September 9, 2021, President Biden issued two Executive  
19 Orders: No. 14042 and No. 14043. *See Smith v. President Biden*, No. 1:21-CV-  
20 19457, 2021 WL 5195688, at \*2 (D.N.J. Nov. 8, 2021). Executive Order 14043

1 requires all federal employees to be fully vaccinated; the Safer Federal Workforce  
2 Task Force (the “Task Force”) issued guidance on September 13, 2021 clarifying  
3 the deadline for federal employees to be fully vaccinated is November 22, 2021.

4 *Id.*

5 Executive Order 14042 essentially requires employers who contract with the  
6 federal government to ensure their employees are fully vaccinated. *Id.* This is  
7 achieved by requiring federal departments and agencies to introduce new  
8 contractual clauses that require covered contractors and subcontractors to comply  
9 with the guidance provided by the Task Force. *Id.* The Task Force issued  
10 guidance on September 23, 2021 stating that covered contractor employees need to  
11 be fully vaccinated by December 8, 2021. *Id.*

12 Federal Defendants argue Plaintiff lacks standing because Plaintiff is not  
13 subject to the provisions of Executive Order 14043, nor does he face threats of  
14 having the provisions applied to him. ECF No. 36 at 5. Plaintiff’s First  
15 Supplement to Complaint states he was informed by his employer on September  
16 30, 2021 that “President Biden’s *Executive Order on Ensuring Adequate COVID*  
17 *Safety Protocols for Federal Contractors*” applies to contractor and subcontractor  
18 employees, and those individuals would “need to be fully vaccinated by December  
19 8, unless exempted for religious or medical reasons.” ECF No. 32 at 6, ¶ 25.

20 Plaintiff’s Complaint states he is “employed by a federal government sub-



1 contractor.” ECF No. 1 at 3, ¶ 5. Moreover, Plaintiff confirmed at oral argument  
2 that he is subject to the Executive Orders.

3 To establish standing in federal court, a plaintiff must demonstrate three  
4 elements: (1) plaintiff must have suffered an injury in fact that is concrete and  
5 particularized, and actual or imminent; (2) there must be a causal connection  
6 between the injury and the challenged conduct that is fairly traceable to the  
7 defendant’s actions; and (3) it must be “likely” as opposed to “speculative” that the  
8 injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*,  
9 504 U.S. 555, 560–61 (1992). Additionally, courts will consider “whether the  
10 alleged injury is more than a mere generalized grievance, whether the plaintiff is  
11 asserting her own rights or the rights of third parties, and whether the claim falls  
12 within the zone of interests to be protected or regulated by the constitutional  
13 guarantee in question.” *Wolfson v. Brammer*, 616 F.3d 1045, 1056 (9th Cir. 2010)  
14 (internal quotations and citation omitted). The party invoking federal jurisdiction  
15 bears the burden of establishing these elements. *Lujan*, 504 U.S. at 561.

16 Even though Plaintiff is subject to the Executive Orders, Plaintiff does not  
17 have standing to challenge them at this time because he has not alleged a  
18 particularized injury in fact that is actual or imminent. After spending a great deal  
19 of his pleadings explaining the development of the COVID-19 pandemic, the  
20 various responses by national governments and international organizations, as well

1 as the development of several COVID-19 vaccines, Plaintiff fails to articulate how  
2 he has been personally affected by any of the described circumstances. ECF Nos.  
3 1 at 5–16, ¶¶ 14–61; 32 at 5–6, ¶¶ 15–25.

4 Plaintiff takes particular issue with the vaccination requirements for federal  
5 employees and contractors under President Biden’s Executive Orders, but again,  
6 Plaintiff does not articulate how he has been, or will be, harmed by the Orders.  
7 Plaintiff has not given any indication of his vaccination status with regard to  
8 COVID-19; if Plaintiff is not currently vaccinated, he has not indicated whether or  
9 not he intends to comply with the Executive Orders’ vaccination requirements.  
10 Further, if Plaintiff fails to comply, he has not articulated whether he faces any  
11 adverse consequences. In any event, the deadlines to comply with the Executive  
12 Orders have not yet passed; thus, any possible adverse consequences Plaintiff may  
13 face are purely speculative at this point, which is insufficient to establish standing.  
14 *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 410–14 (2013). Therefore,  
15 Plaintiff has failed to establish standing to pursue any claims against Executive  
16 Order Nos. 14042 and 14043.

17 **B. Crimes Against Humanity, Betrayal of Public Trust**

18 Counts 37–40, 41, and 43–46 allege Federal Defendants have committed  
19 “crimes against humanity” and betrayed the public’s trust. ECF No. 1 at 22–24, ¶¶  
20 111–20, 127–32. Federal Defendants move for dismissal on the grounds that

1 Plaintiff lacks standing to pursue generalized claims and because Plaintiff has  
2 failed to state a claim on which relief may be granted. ECF No. 36 at 5–11.

3 As previously discussed, Plaintiff must have suffered a particularized harm  
4 or be under imminent threat of harm in order to establish standing. Plaintiff has  
5 failed to meet this burden for the alleged crimes against humanity and betrayal of  
6 public trust because he alleges only generalized harm on behalf of the public at  
7 large; Plaintiff does not allege he personally has suffered a harm. *See* ECF No. 1  
8 at 22–24, ¶¶ 111–20, 127–32. Moreover, Plaintiff cites to no legal authority that  
9 would provide relief for the alleged wrongful conduct. Consequently, dismissal of  
10 Counts 37–40, 41, and 43–46 is proper because Plaintiff lacks standing and  
11 because he has failed to state a claim upon which relief may be granted.

### 12 **C. Vaccine Emergency Use Authorization**

13 Count 47 alleges Defendants Dr. Fauci, CDC, FDA, and NIH violated the  
14 Food, Drug, and Cosmetics Act (“FDCA”), 21 U.S.C § 360bbb-3(c)(3), by  
15 granting Emergency Use Authorizations (“EUA”) for the COVID-19 vaccines.  
16 ECF No. 1 at 24, ¶¶ 133–34. It is unclear whether Plaintiff is challenging only the  
17 EUA itself or the FDA’s rulemaking authority to issue EUAs. Federal Defendants  
18 move to dismiss the claim on the grounds that Plaintiff has failed to exhaust his  
19 administrative remedies, and because the Administrative Procedure Act (“APA”)  
20 prohibits judicial review of EUAs. ECF No. 36 at 7.

1 Interested parties who wish to challenge an FDA regulation, like the EUA  
2 for COVID-19 vaccines, are required to exhaust administrative remedies before  
3 filing suit in federal court. *Ass'n of Am. Physicians & Surgeons, Inc. v. Food &  
4 Drug Admin.*, 539 F. Supp. 2d 4, 21 (D.D.C. 2008) (citing 21 C.F.R. §§ 10.30,  
5 10.25). Plaintiff has not indicated that he has taken any steps to exhaust his  
6 administrative remedies. Accordingly, Plaintiff may not pursue his claim  
7 challenging the issuance of the EUA in this Court.

8 Additionally, the Court cannot grant the relief Plaintiff seeks for this claim  
9 because judicial review is unavailable for decisions that are committed to agency  
10 discretion as a matter of law. *City & Cty. of San Francisco v. U.S. Dep't of  
11 Transp.*, 796 F.3d 993, 1001 (9th Cir. 2015) (quoting 5 U.S.C. § 701(a)(2)). Here,  
12 the provisions of the FDCA expressly reserve decisions regarding EUAs to agency  
13 discretion. 21 U.S.C. §360bbb-3(i) (“Actions under the authority of this section by  
14 the Secretary, by the Secretary of Defense, or by the Secretary of Homeland  
15 Security are committed to agency discretion.”). Thus, Plaintiff has failed to state a  
16 claim on which relief may be granted.

17 Count 47 challenging the EUA for the COVID-19 vaccines is properly  
18 dismissed because Plaintiff has failed to exhaust his administrative remedies and  
19 because Plaintiff has not stated a claim upon which relief may be granted.

20 //

1                   **D. *Bivens* Claims**

2                   Counts 24–36 allege Defendants Dr. Fauci, CDC, FDA, and NIH conspired  
3 to violate Plaintiff’s and the American people’s constitutional rights by spreading  
4 misinformation about COVID-19 and its available treatments. ECF No. 1 at 21–  
5 22, ¶¶ 102–10. Federal Defendants move to dismiss on the grounds that Plaintiff’s  
6 claims do not fall within the scope of a *Bivens* cause of action; Plaintiff’s claims  
7 against Defendants CDC, FDA, and NIH are improper; and Plaintiff lacks standing  
8 to pursue a *Bivens* claim on behalf of the “American people.” ECF No. 36 at 7–8.

9                   As an initial matter, Plaintiff’s *pro se* status prohibits him from asserting  
10 claims on behalf of anyone but himself. *Simon*, 546 F.3d at 664. Additionally,  
11 Plaintiff may not assert a *Bivens* claim against Defendants CDC, FDA, and NIH  
12 because *Bivens* claims cannot be brought against federal agencies. *F.D.I.C. v.*  
13 *Meyer*, 510 U.S. 471, 484–86 (1994). Thus, Plaintiff’s *Bivens* claims asserted on  
14 behalf of the “American people” are dismissed, as are the *Bivens* claims asserted  
15 against Defendants CDC, FDA, and NIH.

16                   As to remaining Defendant Dr. Fauci, Plaintiff alleges violations of his First,  
17 Ninth, and Tenth Amendment rights. ECF No. 1 at 21–22, ¶¶ 102–10. Plaintiff’s  
18 claims fail as a matter of law. The Supreme Court has stated there are only three  
19 instances in which the Court has recognized an implied damages remedy under the  
20 Constitution: violations of the Fourth Amendment based on unreasonable search

1 and seizure (*Bivens v. Six Unknown Fed'l Narcotics Agents*, 403 U.S. 388 (1971));  
2 violations of the Fifth Amendment based on gender discrimination (*Davis v.*  
3 *Passman*, 442 U.S. 228 (1979)); and violations of the Eighth Amendment based on  
4 the denial of medical care for serious medical conditions (*Carlson v. Green*, 446  
5 U.S. 14 (1980)). *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017). Thus, *Bivens*  
6 implied causes of action are available under a very limited set of circumstances,  
7 none of which are present here.

8 First, it is unclear which of his First Amendment rights Plaintiff believes  
9 were violated. He claims a right to “life, liberty, and pursuit of happiness,” but this  
10 language, of course, is pulled from the Declaration of Independence, not the United  
11 States Constitution. In any event, Plaintiff’s claims do not fall within the scope of  
12 permissible *Bivens* causes of action. Second, “the ninth amendment has never  
13 been recognized as independently securing any constitutional right, for purposes of  
14 pursuing a civil rights claim.” *Strandberg v. City of Helena*, 791 F.2d 744, 748  
15 (9th Cir. 1996). Similarly, the Tenth Amendment does not permit a private right of  
16 action. *Bimber's Delwood, Inc. v. James*, 496 F. Supp. 3d 760, 786–87 (W.D.N.Y.  
17 2020). Thus, Plaintiff’s Ninth and Tenth Amendment claims cannot survive  
18 without an articulated civil rights violation, which Plaintiff has failed to plead.

19 Consequently, Plaintiff has failed to state a cognizable *Bivens* cause of  
20 action against Defendants Dr. Fauci, CDC, FDA, and NIH. Counts 24–36 are

1 properly dismissed because Plaintiff has failed to state a claim upon which relief  
2 may be granted.

### 3 **E. Constitutional Claims Against Defendant Biden**

4 Plaintiff asserts a variety of federal constitutional violations in Counts 1–5  
5 and 6–11, including intrusion of bodily autonomy, imposition of cruel and unusual  
6 punishment, unlawful seizures of liberty, and others. ECF Nos. 1 at 17–19, ¶¶ 62–  
7 82; 32 at 7, ¶ 27–34. Federal Defendants move to dismiss the claims on the  
8 grounds that Plaintiff seeks only declaratory and injunctive relief against President  
9 Biden, and the Court lacks jurisdiction to enter such relief against a President.  
10 ECF No. 36 at 8.

11 The principles of separation-of-powers generally counsel courts against  
12 granting injunctive and declaratory relief against the President in the performance  
13 of his official duties unless he has no authority to act in the first place. *Rosebud*  
14 *Sioux Tribe v. Trump*, 428 F. Supp. 3d 282, 291 (D. Mont. 2019) (citing *Franklin*  
15 *v. Massachusetts*, 505 U.S. 788, 802–03 (1992) (plurality)). Courts may, however,  
16 enjoin executive orders, or portions thereof, where the order “exceeds the statutory  
17 authority delegated by Congress and constitutional boundaries.” *Id.* (quoting  
18 *Hawaii v. Trump*, 859 F.3d 741, 768 (9th Cir. 2017) (*dismissed as moot*, 138 S. Ct.  
19 377 (2017))).

20 Federal Defendants argue Plaintiff seeks injunctive and declaratory relief

1 against the President. ECF No. 36 at 9. However, liberally construing Plaintiff's  
2 Complaint, it appears Plaintiff is seeking relief against President Biden's Executive  
3 Orders, not the President personally. Plaintiff repeatedly asserts "Biden's order" or  
4 "Biden's vaccine mandate" is unconstitutional and exceeds the President's  
5 authority. *See, e.g.*, ECF Nos. 1 at 17–18, ¶¶ 62–71; 32 at 7, ¶¶ 27–34. Because  
6 granting injunctive or declaratory relief against an Executive Order is within the  
7 power of the courts, Plaintiff could, theoretically, challenge President Biden's  
8 Executive Order Nos. 14042 and 14043.

9       However, as previously discussed, Plaintiff lacks standing at this time to  
10 challenge these Executive Orders because he has not stated a particularized harm  
11 that is actual or imminent. Plaintiff has not alleged that he has been forcibly  
12 subjected to COVID-19 testing nor has he alleged he has been forced to submit to a  
13 COVID-19 vaccine. In fact, Plaintiff acknowledges there are alternatives to the  
14 vaccination requirement in the form of religious or medical exemptions. ECF No.  
15 32 at 5, ¶ 20. Alternatively, Plaintiff could seek employment outside the federal  
16 government and avoid being subject to the Executive Orders. Furthermore, any  
17 harm Plaintiff is attempting to allege is purely speculative at this point because the  
18 deadlines to comply with the Executive Orders have not yet passed. Therefore,  
19 dismissal of Counts 1–5 and 6–11 is proper because Plaintiff has failed to establish  
20 standing to challenge the Executive Orders.



1 Based on the foregoing, the Court grants Federal Defendants’ Motion to  
2 Dismiss (ECF No. 36). Counts 1–5 and 6–11 are **dismissed without prejudice**. If  
3 Plaintiff is able to establish standing at a later date, he may pursue claims against  
4 the Executive Orders. Counts 24–36, 37–40, 41, 43–46, and 47 are **dismissed**  
5 **with prejudice**.

6 The Court next turns to Plaintiff’s Motion for Preliminary Injunction and  
7 Temporary Restraining Order (ECF No. 19). Because the remaining claims pertain  
8 only to State Defendants, the Court will not address any claims raised in Plaintiff’s  
9 motion that relate to Federal Defendants.

## 10 II. Legal Standard—Preliminary Injunction

11 Pursuant to Federal Rule of Civil Procedure 65, a district court may grant a  
12 temporary restraining order (TRO) to prevent “immediate and irreparable injury.”  
13 Fed. R. Civ. P. 65(b)(1)(A). The analysis for granting a temporary restraining  
14 order is “substantially identical” to that for a preliminary injunction. *Stuhlbarg*  
15 *Int’l Sales Co., Inc. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001).  
16 It “is an extraordinary remedy never awarded as of right.” *Winter v. Nat. Res. Def.*  
17 *Council, Inc.*, 555 U.S. 7, 24 (2008).

18 To obtain this relief, a plaintiff must demonstrate: (1) a likelihood of success  
19 on the merits; (2) a likelihood of irreparable injury in the absence of preliminary  
20 relief; (3) that a balancing of the hardships weighs in plaintiff’s favor; and (4) that

1 a preliminary injunction will advance the public interest. *Winter*, 555 U.S. at 20;  
2 *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012). Under the *Winter* test, a  
3 plaintiff must satisfy each element for injunctive relief.

4 Alternatively, the Ninth Circuit also permits a “sliding scale” approach  
5 under which an injunction may be issued if there are “serious questions going to  
6 the merits” and “the balance of hardships tips sharply in the plaintiff’s favor,”  
7 assuming the plaintiff also satisfies the two other *Winter* factors. *All. for the Wild*  
8 *Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (“[A] stronger showing of  
9 one element may offset a weaker showing of another.”); *see also Farris v.*  
10 *Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) (“We have also articulated an  
11 alternate formulation of the *Winter* test, under which serious questions going to the  
12 merits and a balance of hardships that tips sharply towards the plaintiff can support  
13 issuance of a preliminary injunction, so long as the plaintiff also shows that there is  
14 a likelihood of irreparable injury and that the injunction is in the public interest.”  
15 (internal quotation marks and citation omitted)).

#### 16 **A. Likelihood of Success on the Merits**

17 Plaintiff claims Governor Inslee’s Proclamation, which requires certain state  
18 employees and contractors be fully vaccinated, violates his constitutional rights.  
19 ECF Nos. 1, 32. Despite alleging numerous violations, Plaintiff raises only two  
20 issues in the present motion: alleged violations of his “fundamental right to

1 privacy, informed consent, bodily integrity, bodily autonomy, and the right to die,”  
2 and alleged violations the Fourth Amendment’s prohibition against unreasonable  
3 search and seizure. ECF No. 21 at 21–22. To obtain injunctive relief, Plaintiff  
4 must show that there are “serious questions going to the merits” of his claims, and  
5 that he is likely to succeed on the merits. *Cottrell*, 632 F.3d at 1131; *Farris*, 677  
6 F.3d at 865.

7 *I. Right to Privacy, Bodily Integrity, etc.*

8 Plaintiff argues the Proclamation infringes on his substantive due process  
9 rights and must survive strict scrutiny. ECF No. 21 at 14–23. State Defendants  
10 argue the Proclamation does not infringe upon any fundamental rights and is  
11 subject to rational basis, which it easily survives. ECF No. 38 at 11.

12 As an initial matter, Plaintiff seeks “appropriate declaratory relief regarding  
13 the unconstitutionality, facially and as applied, of the Washington State Executive  
14 Order on Vaccination and Testing” for violations of Plaintiff’s asserted right to  
15 bodily autonomy, informed consent, and right to refuse medical care; Plaintiff does  
16 not assert any violations of his religious rights. ECF Nos. 21 at 15; 32 at 8. “[T]he  
17 two tests for whether a law is neutral and generally applicable focus on whether a  
18 law specifically targets or singles out religion.” *Parents for Priv. v. Barr*, 949 F.3d  
19 1210, 1234–35 (9th Cir.), *cert. denied*, 141 S. Ct. 894, 208 L. Ed. 2d 452 (2020).

20 Thus, Plaintiff has not advanced an as-applied challenge to the Proclamation

1 because he claims no violations of his religious liberties. The Court will address  
2 only the facial challenge.

3 “To succeed on a facial challenge, the challenger must establish that no set  
4 of circumstances exists under which the regulation would be valid.” *Doe v.*  
5 *Zucker*, 496 F. Supp. 3d 744, 754 (N.D.N.Y. 2020) (internal brackets omitted).  
6 Judicial review of facial challenges is limited to the text of the law or regulation  
7 itself. *Young v. Hawaii*, 992 F.3d 765, 779 (9th Cir. 2021). Facial challenges are  
8 more difficult to prove than as-applied challenges. *Id.* Plaintiff argues the  
9 Proclamation is facially unconstitutional because it infringes on Plaintiff’s “right to  
10 privacy, informed consent, bodily integrity, bodily autonomy, and the right to die.”  
11 ECF No. 21 at 14.

12 Plaintiff’s argument is not persuasive. First, while Plaintiff has a  
13 fundamental right to privacy, he does not have a fundamental right to refuse a  
14 vaccine. *Jacobson v. Massachusetts*, 197 U.S. 11, 26–27 (1905); *Norris v. Stanley*,  
15 ---F. Supp. 3d---, No. 1:21-CV-756, 2021 WL 4738827, at \*2 (W.D. Mich. Oct. 8,  
16 2021); *Williams v. Brown*, ---F. Supp. 3d---, No. 6:21-CV-01332-AA, 2021 WL  
17 4894264, at \*8 (D. Or. Oct. 19, 2021). Second, the Proclamation does not require  
18 individuals to get vaccinated; it simply creates employment requirements for  
19 certain state workers. As our sister court in the Western District explained, “The  
20 State is not forcing its employees to receive an injection against their will. They

1 have a choice. The choice is vaccination or no longer working for the State.” ECF  
2 No. 39-1 at 191.

3 Relatedly, Plaintiff does not have a constitutionally protected interest in his  
4 continued employment as a coach or sports officiant. *Massachusetts Bd. of Ret. v.*  
5 *Murgia*, 427 U.S. 307, 313 (1976); *Norris*, 2021 WL 4738827, at \*2 (explaining  
6 that employer vaccine requirements do not force employees to forgo their rights to  
7 privacy and bodily autonomy, but if employees choose not to get vaccinated, they  
8 do not have a right to remain employed). Moreover, the Proclamation recognizes  
9 legally permissible exemptions. ECF No. 21-1 at 19–27. Based on the plain text  
10 of the Proclamation, there is no invasion of Plaintiff’s right to bodily integrity;  
11 Plaintiff can choose to get vaccinated, choose to apply for an exemption, or choose  
12 to coach and officiate elsewhere. Plaintiff has failed to demonstrate there are no  
13 circumstances under which the Proclamation would be valid.

14 Next, the Court turns to Plaintiff’s argument that the Proclamation does not  
15 survive strict scrutiny. ECF No. 21 at 15. Federal courts routinely analyze  
16 challenges to employer-based vaccine requirements under rational basis. *See, e.g.,*  
17 *Klaassen v. Trustees of Indiana Univ.*, --- F. Supp. 3d ---, No. 1:21-CV-238 DRL,  
18 2021 WL 3073926, at \*20 (N.D. Ind. July 18, 2021); *Williams v. Brown*, No. ---F.  
19 Supp. 3d---, 6:21-CV-01332-AA, 2021 WL 4894264, at \*8 (D. Or. Oct. 19, 2021).  
20 Nonetheless, for the purposes of the present motion, the Court need not decide

1 which standard should apply because the Proclamation survives both strict scrutiny  
2 and rational basis. First, the Supreme Court has endorsed the “compelling” interest  
3 in slowing the spread of COVID-19. *Roman Cath. Diocese of Brooklyn v. Cuomo*,  
4 141 S. Ct. 63, 67 (2020). The Proclamations is narrowly tailored in that it applies  
5 to specific employment sectors whose workers are essential to combatting COVID-  
6 19 and who come into regular contact with large segments of the public.

7 Moreover, the State has a legitimate government interest in preventing the  
8 spread of COVID-19. *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905); *Slidewaters*  
9 *LLC v. Washington State Dep’t of Lab. & Indus.*, 4 F.4th 747, 758 (9th Cir. 2021).

10 The Proclamation is rationally related to that interest because it is based on  
11 overwhelming evidence that the vaccines are safe and effective, and increasing  
12 vaccination rates among state workers who come into regular contact with  
13 members of the public is a rational action to reduce the spread of COVID-19.

14 Plaintiff’s objections to the vaccine mandate rests primarily on his  
15 disagreement with State Defendants’ judgment regarding public health, which is  
16 insufficient to overcome the constitutionality of State Defendants’ actions in  
17 enacting and promulgating the vaccine mandate, regardless of which level of  
18 scrutiny is applied. Plaintiff has failed to demonstrate there are serious questions  
19 going to the merits of his privacy and bodily autonomy claims, and that he is likely  
20 to succeed on those questions of merit.

1                                    2.        *Fourth Amendment Rights*

2            Plaintiff argues any COVID-19 testing requirement is subject to the  
3 reasonable suspicion standards under the Fourth Amendment. ECF No. 21 at 21.  
4 However, the Proclamation does not contain or implicate a testing requirement.  
5 *See* ECF No. 21-1 at 41–53. Therefore, Plaintiff’s Fourth Amendment claim is  
6 without merit. Plaintiff has failed to demonstrate there are serious questions going  
7 to the merits of his Fourth Amendment claim, and that he is likely to succeed on  
8 those questions of merit.

9                                    **B. Irreparable Harm**

10           Plaintiff’s claims to irreparable harm seem to rest on his theories of privacy  
11 and bodily integrity, and his potential loss of supplemental income as a coach.  
12 ECF No. 21 at 25–26. A plaintiff seeking injunctive relief must “demonstrate that  
13 irreparable injury is *likely* in the absence of an injunction.” *Winter*, 555 U.S. at 22  
14 (emphasis in original) “Issuing a preliminary injunction based only on a  
15 possibility of irreparable harm is inconsistent with [the Supreme Court’s]  
16 characterization of injunctive relief as an extraordinary remedy that may only be  
17 awarded upon a clear showing that the plaintiff is entitled to such relief.” *Id.*  
18 “Irreparable harm is traditionally defined as harm for which there is no adequate  
19 legal remedy, such as an award of damages.” *Arizona Dream Act Coalition v.*  
20 *Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014).

1 As previously discussed, the vaccine requirements under the Proclamation  
2 do not infringe upon Plaintiff's fundamental right to privacy and his decisions  
3 regarding bodily integrity. Moreover, it is well settled that loss of employment  
4 does not constitute irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 92 n.68  
5 (1974) (absent a "genuinely extraordinary situation," employment loss is not  
6 irreparable harm); *Massachusetts Correction Officers Federated Union v. Baker*, --  
7 - F. Supp. 3d ---, No. 21-11599-TSH, 2021 WL 4822154, at \*7 (D. Mass. Oct. 15,  
8 2021); *Beckerich v. St. Elizabeth Med. Ctr.*, --- F. Supp. 3d ---, No. CIV 21-105-  
9 DLB-EBA, 2021 WL 4398027, at \*6 (E.D. Ky. Sept. 24, 2021). Plaintiff's  
10 admission that the game fee he earns amounts to something less than minimum  
11 wage further weakens his argument for irreparable harm.

12 Finally, Plaintiff's delay in filing the present motion does not support his  
13 claim of irreparable harm. Plaintiff filed the motion on October 17, 2021, nearly  
14 two months after the issuance of the Proclamation. Plaintiff's dilatory filing  
15 "implies a lack of urgency and irreparable harm." *Oakland Trib., Inc. v. Chron.*  
16 *Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985). The Court finds Plaintiff has not  
17 carried his burden to demonstrate irreparable harm absent a temporary restraining  
18 order.

### 19 **C. Balancing of Equities and Public Interest**

20 "When the government is a party, these last two factors merge." *Drakes Bay*



1 *Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). “In each case, courts  
2 must balance the competing claims of injury and must consider the effect on each  
3 party of the granting or withholding of the requested relief.” *Winter*, 555 U.S. at  
4 24 (quotation marks and citation omitted). The Court must balance the hardships  
5 to the parties should the *status quo* be preserved against the hardships to the parties  
6 should Plaintiffs’ requested relief be granted. “In exercising their sound discretion,  
7 courts of equity should pay particular regard for the public consequences in  
8 employing the extraordinary remedy of injunction.” *Id.* (quotation omitted). “The  
9 public interest inquiry primarily addresses impact on non-parties rather than  
10 parties.” *League of Wilderness Defs./Blue Mountains Biodiversity Project v.*  
11 *Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014) (citation omitted). Regardless,  
12 the Court will not grant a preliminary injunction unless the public interests in favor  
13 of granting an injunction “outweigh other public interests that cut in favor of *not*  
14 issuing the injunction.” *Cottrell*, 632 F.3d at 1138 (emphasis in original).

15 Here, the balancing of equities tips heavily in favor of the evidenced-backed  
16 decisions of the State regarding public health and safety measures. While the  
17 Court is sensitive to the potential loss of coaching opportunities that Plaintiff may  
18 face should his relationship with the State change, the balancing of harm and  
19 equities weighs in favor of State Defendants because there is a “legitimate and  
20 critical public interest in preventing the spread of COVID-19 by increasing the

1 vaccination rate.” *Baker*, 2021 WL 4822154, at \*8. Moreover, the public interest  
2 in reducing the dangers and spread of COVID-19 would not be served by enjoining  
3 the Proclamation. District courts across the country have come to the same  
4 conclusion. *See, e.g., Does 1-6 v. Mills*, --- F. Supp. 3d ---, No. 1:21-CV-00242-  
5 JDL, 2021 WL 4783626, at \*17 (D. Me. Oct. 13, 2021), *aff’d*, No. 21-1826, 2021  
6 WL 4860328 (1st Cir. Oct. 19, 2021) (collecting cases). As one court noted  
7 “[w]eakening the State’s response to a public-health crisis by enjoining it from  
8 enforcing measures employed specifically to stop the spread of COVID-19 is not  
9 in the public interest.” *Bimber’s Delwood, Inc. v. James*, 496 F. Supp. 3d 760, 789  
10 (W.D.N.Y. 2020). Therefore, the Court finds the balance of equities tips in favor  
11 of State Defendants and that the public interest would not be served by enjoining  
12 the Proclamation.

### 13 CONCLUSION

14 The Court finds that Plaintiff’s claims against Federal Defendants are  
15 properly dismissed for either a lack of jurisdiction or a failure to state a claim upon  
16 which relief may be granted. Additionally, Plaintiff has failed to satisfy either the  
17 *Winter* test or the *Cottrell* sliding scale test for the remaining claims against State  
18 Defendants. Therefore, Plaintiff is not entitled to the relief he seeks.

19 //

20 //

1 **ACCORDINGLY, IT IS HEREBY ORDERED:**

2 1. Federal Defendants' Motion to Dismiss (ECF No. 36) is **GRANTED**.

3 Claims 1–5 and 6–11 asserted in Plaintiff's Complaint (ECF No. 1) and  
4 Supplement to Complaint (ECF No. 32) against Federal Defendants are  
5 **DISMISSED without prejudice**. Claims 24–36, 37–40, 41, 43–46, and  
6 47 asserted in Plaintiff's Complaint (ECF No. 1) against Federal  
7 Defendants are **DISMISSED with prejudice**.

8 2. Plaintiff may submit a First Amended Complaint **within fourteen (14)**  
9 **days** of the date of this Order. Plaintiff shall set forth his factual  
10 allegations in separately numbered paragraphs. This Amended  
11 Complaint will operate as a complete substitute for (rather than a mere  
12 supplement to) the original complaint. The First Amended Complaint  
13 must be legibly rewritten or retyped in its entirety, it may not incorporate  
14 any part of the original complaint by reference, and it must be labeled the  
15 "First Amended Complaint" with the cause number 4:21-CV-5119-TOR  
16 appearing in the caption. Plaintiff is cautioned that if he fails to amend  
17 within 14-days, the Court will dismiss all Federal Defendants and the  
18 case will proceed on the remaining counts of the original complaint  
19 against the State Defendants only.

20 //

3. Additionally, the claims asserted in Plaintiff's Complaint (ECF No. 1) and Supplement to Complaint (ECF No. 32) on behalf of JBJ, a minor child, and "similarly situated individuals" are **DISMISSED with prejudice.**

4. The Clerk of the Court is directed to **TERMINATE** Plaintiff JBJ, a minor child, and "similarly situated individuals" from this action and adjust the docket sheet accordingly.

5. Plaintiffs' Motion for Preliminary Injunction (ECF No. 19) is **DENIED.**

The District Court Executive is directed to enter this Order and furnish copies to counsel.

DATED November 19, 2021.



*Thomas O. Rice*  
THOMAS O. RICE  
United States District Judge